Filed 4/20/10 P. v. True CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **DAVID A. TRUE,** **Defendant and Appellant.**	**A121975** **(Sonoma County Super. Ct. No. SCR489415)**

Appellant David A. True contacted the California Highway Patrol (CHP) to obtain a new vehicle identification number (VIN) for a custom Harley Davidson motorcycle he claimed to have built from salvaged parts. Officers became suspicious during their inspection of the motorcycle, and it was eventually determined that many of its major components (including the engine, frame and transmission) came from a motorcycle that had been stolen the year before in a nearby community. Vehicle identification numbers on the motorcycle appeared to have been removed or altered.

Following a jury trial, appellant was convicted of a felony count of receiving a stolen motor vehicle (Pen. Code, § 496, subd. (a)), a felony count of altering a vehicle identification number with the intent to conceal the vehicle's identity (Veh. Code, § 10802) and a misdemeanor count of defacing a motor vehicle identity number (Veh. Code, § 10750, subd. (a)). He appeals from the judgment placing him on felony probation, asserting that his convictions must be reversed due to instructional errors, prosecutorial misconduct and the erroneous admission of hearsay evidence. We agree that the trial court misstated the law when it responded to a juror question about the

knowledge element of Penal Code section 496d. We reverse that count and affirm the remaining Vehicle Code counts.

FACTS

Guy Carlson lived and worked in Santa Rosa. In 2002, he purchased a 100th Anniversary 2003 Harley-Davidson Soft Tail Fatboy motorcycle. The motorcycle was stolen from the parking lot of Carlson's employer on June 22, 2003.

In early 2006, appellant contacted the Sonoma County CHP office to request a VIN verification for a motorcycle he claimed to have built from salvaged parts. He intended to raffle off the motorcycle to benefit the CHP's Widows and Orphans Fund, a charity he had supported in the past, and he needed to register the motorcycle with the Department of Motor Vehicles. In California, the CHP can assign a VIN to a vehicle.

CHP officers DeBois and Cincera inspected the motorcycle at appellant's towing business in Petaluma, where they became suspicious upon noticing that the VIN number on the headstock had been ground off. The headstock is the area on the frame where the gas tank, headlight and forks are welded together, and is the location where a VIN is stamped on a motorcycle. The engine number appeared to have been altered, having been stamped in a manner that was inconsistent with Harley-Davidson markings, and was reported "not on file." Appellant told the officers that he had built the motorcycle using parts from a number of 2003 motorcycles, including engine parts and a headstock he bought at a swap meet in Oakland.

The case was turned over to the Sonoma County Auto Theft Task Force (Task Force) and the motorcycle was taken into custody. The numbers on the motorcycle were not consistent with Harley-Davidson VINs; for example, the engine number had 14 characters rather than the 10 it should have had and the crank case number had a false identification number. The part numbers on the engine, transmission and frame appeared to match exactly, even though the numbers on a Harley Davidson will have numbers of different lengths. The VIN had been ground down and dye stamped, even though the

VINs on Harley-Davidsons are pin-stamped.[1] With the assistance of Peter Simet, a Harley-Davidson identification specialist familiar with confidential markings placed on Harley-Davidson motorcycles for identification purposes, it was determined that the frame, engine and transmission of appellant's motorcycle were taken from the motorcycle that was stolen from Guy Carlson in 2003. Additionally, other parts such as the headlight, fenders and gas tank were consistent with the stolen motorcycle.

Appellant was interviewed by CHP Officer Monge (Monge) of the Task Force. Appellant initially claimed to have bought the engine and drive train for the motorcycle in Montana. Later in the same interview, after Monge showed him a receipt from a "J. Davis" in Odessa, Oregon, appellant said he had been driving through southern Oregon when he saw two 2003 Harley-Davidson Fatboys sitting in a field with a for sale sign. Appellant told Monge that after speaking to Jon Davis, the owner, he called his friend CHP Officer Keeran and asked him to run a check to see if the motorcycles were stolen. According to appellant, Keeran told him that one of them came back "clear," so appellant bought the motorcycle along with some other parts.

Appellant also told Monge that he had purchased the frame of his motorcycle from Dan Barzee at Sonoma Custom Choppers. Asked about the grind marks on the motorcycle frame, appellant acknowledged to Monge that he had removed some numbers by painting over them. Appellant told Monge that there had only been five or six numbers on the frame, and he had ground them off. He might have welded over them, but said he was not sure. He explained that he had not liked the way the numbers looked.

Officer Keeran denied that, around June 12, 2004, he had run the identification numbers on a motorcycle. An analysis of the state's computer system showed that no one had run the numbers during the time period claimed by appellant. Oregon law enforcement was unable to track down the "J. Davis" who had allegedly sold appellant the motorcycle engine. Dan Barzee denied selling appellant the motorcycle frame and

[1] Pin stamping is done with a machine that puts the number or letter on the engine one pin dot at a time. A dye stamp rotates and stamps a complete number or letter onto the surface.

maintained that his shop had never sold Harley-Davidson parts. The receipt that appellant claimed corresponded to his purchase of the frame did not look like a receipt generated by Sonoma Custom Choppers. Ted Green, a co-owner of Sonoma Custom Choppers, was told by appellant that he had won the motorcycle in a poker game with some biker friends.

At trial, appellant maintained that he had purchased the engine of his motorcycle in southern Oregon from a man named "J. Davis" and had purchased the frame from Dan Barzee. He claimed the motorcycle frame had only a partial VIN when he purchased it from Barzee. He had removed the section of the frame with the remaining numbers intending to save it, but the piece with the number had been lost.

DISCUSSION

A. *Jury Question Regarding Knowledge Element of Penal Code section 496d, subdivision (a)*

Appellant argues that his conviction of receiving a stolen motor vehicle must be reversed because the trial court incorrectly answered a jury question regarding the necessary concurrence of guilty knowledge and receipt of the stolen vehicle. We agree.

Count one of the amended information charged appellant with a violation of Penal Code section 496d, subdivision (a), which provides, "Every person who buys or receives any motor vehicle, as defined in Section 415 of the Vehicle Code . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling or withholding any motor vehicle . . . from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in the state prison for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in a county jail . . . ." This offense is a variation of receiving stolen property under Penal Code section 496, subdivision (a), with the added requirement that the property stolen must be a motor vehicle, a trailer, special construction equipment or a vessel. (See generally *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425; *In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.)

Although Penal Code section 496d, subdivision (a), may be violated in a number of ways, the court instructed the jury with a modified version of CALCRIM No. 1750 that was limited to the theory that appellant had *purchased* stolen property : "The Defendant is charged in Count I with receiving stolen property. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant bought property that had been stolen; [¶] AND [¶] 2. When the defendant bought the property, he knew that the property had been stolen. [¶] Property is *stolen* if it was obtained by any type of theft, or by burglary or robbery. [¶] To *receive property* means to take possession and control of it. Mere presence near or access to the property is not enough. . . ."

During deliberations, one of the jurors presented the court with a note asking, "To prove to myself 'beyond a reasonable doubt' that the defendant received stolen property, do I have to know that the defendant knew the property was stolen at the exact time he bought the property[?]" Defense counsel argued that the answer was "yes." The court advised the jury, "The answer to that question is no, but I'm going to read you a further instruction that relates to other potential ways that you might be looking at this case and it goes as follows: 'The defendant is not guilty of receiving stolen property if he intended to return the property to its owner or deliver the property to law enforcement when he bought, received, concealed, withheld the property. If you have a reasonable doubt about whether the defendant intended to return the property to its owner or deliver the property to law enforcement when he bought, received, concealed or withheld the property, you must find him not guilty of receiving stolen property. [¶] This defense does not apply if the defendant decided to return the property to its owner or deliver the property to law enforcement only after he wrongfully bought, received, concealed and withheld the property. . . .' "

We agree with appellant that the trial court's response was not an accurate statement of the law. A defendant is guilty of receiving stolen property if he knew the property was stolen at the time he committed the act constituting a violation of the statute. (*People v. Wielograf* (1980) 101 Cal.App.3d 488, 493, fn. 1.) In this case, the only act specified as a violation of the statute was the purchase of a stolen motor vehicle

under Penal Code section 496d. The court's answer to the jury's question was inaccurate because a defendant who violates section 496d by purchasing a stolen motor vehicle must know the vehicle is stolen at the time of purchase. (See *People v. Wielograf*, at p. 493, fn. 1.)

The Attorney General suggests that the court's instruction was correct because Penal Code section 496d, subdivision (a), also penalizes the acts of withholding or concealing a stolen motor vehicle and in such cases, the defendant need not know the property was stolen at the precise time he acquired it. We would agree if the case had been submitted to the jury on a concealing or withholding theory. But the instructions given defined the Penal Code section 496d violation solely in terms of the *purchase* of a stolen motor vehicle. (See *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087 [conviction for assault with a deadly weapon under Pen. Code, § 245, subd. (a)(1) reversed because the broomstick used in the attack did not qualify as a deadly weapon; though defendant's acts in hitting and kicking victim might have amounted to assault by means of force likely to cause great bodily injury under other variant of Pen. Code, § 245, subd. (a)(1), jury was instructed only on assault with a deadly weapon].)

In this case, the court could have responded to the juror's note by giving supplemental instructions on the theories of concealing or withholding a stolen motor vehicle and could have advised the jury that appellant need not have known the motorcycle was stolen when he purchased it, provided that he knew it was stolen while he concealed or withheld it from his owner.[2] (See, generally, Pen. Code, § 1138.) Having not received such instructions, the jury might have convicted appellant on the legally invalid theory that he was guilty based on his purchase of a stolen motorcycle, even though he did not know until sometime after the purchase that the motorcycle had been stolen. Because we cannot ascertain from the record that appellant was in fact convicted

[2] The supplemental instruction given by the court referred to the theories of concealing and withholding the stolen property, but its purpose was to advise the jury that appellant was not guilty if he had intended to return the property to its owner or to law enforcement. It did not define the elements of receiving stolen property under a concealing or withholding theory.

under a proper legal theory of receiving a stolen motor vehicle, the conviction of that count must be reversed. (See *People v. Perez* (2005) 35 Cal.4th 1219, 1233; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128.)

Our conclusion makes it unnecessary to consider appellant's other claims of instructional error specific to his conviction of receiving a stolen motor vehicle, namely, that the instructions did not define the "motor vehicle" element of a Penal Code section 496d, subdivision (a), violation and that that CALCRIM No. 376 created an impermissible presumption that appellant had the requisite mental state by virtue of his possession of recently stolen property.

B. *Failure to Give Unanimity Instructions on Counts 2 and 3*

Appellant contends the trial court should have instructed the jurors that they must unanimously agree on the acts that constituted alteration or concealment of the motorcycle's identification numbers under Vehicle Code sections 10802 and 10750, subdivision (a), as alleged in counts 2 and 3. The People concede that such an instruction should have been given but argue that the omission does not require reversal. We agree that any error was harmless.

Where the evidence shows more than one act that could constitute the charged offense and the prosecutor does not elect to rely on any one such act, the court generally must give a unanimity instruction. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294; see CALCRIM No. 3500.) Counts 2 and 3 required proof that appellant concealed or altered vehicle identification numbers on the motorcycle. Appellant admitted during his interview with Officer Monge and during his testimony at trial that he had altered numbers on the motorcycle's frame, and the prosecution elected during closing argument to rely on this conduct rather than on evidence that appellant altered or concealed the number on the engine. But during rebuttal, the prosecution argued that the alteration of engine numbers also could amount to a violation under Counts 2 and 3. Arguably, the jurors should have been instructed that they must unanimously agree which numbers were concealed or altered.

The failure to give a unanimity instruction was harmless beyond a reasonable doubt because there is no reasonable likelihood the jurors disagreed that appellant had altered the numbers on the frame. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 188; *People v. Jones* (1990) 51 Cal.3d 294, 308.) He admitted as much, although he denied that he did so for the purpose of concealing the motorcycle's identity. Reversal of the Vehicle Code counts is not required.[3]

C. *Prosecutorial Misconduct During Closing Argument*

Appellant argues that the prosecutor misstated the burden of proof beyond a reasonable doubt during closing argument and that the trial court compounded the error by endorsing the prosecutor's statements. Although we agree that the challenged portion of the argument had the potential to be misleading if considered out of context, we conclude that any error was harmless.

Appellant focuses on the following comments: "[Prosecutor]: I want to talk to you briefly about reasonable doubt. I don't want to spend a whole lot of time on it. I just want to give you the rest of the instruction and I've underlined the part that was not read, and it just said the evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] Now, what this means is when you're done hearing the evidence, you are going to hear argument, which is not evidence, you are going to go back in the jury room and you are going to deliberate and you will have to ask – each and every one of you will have to ask yourself do I have some sort of doubt in this case on any count that Mr. True is not guilty? Do I have a doubt? If the answer is no, then you are done. [¶] "If the answer is yes, then you move on to the next question which is is my doubt reasonable? Is what I am doubting a reasonable doubt? If the answer is no, then you are done. If the answer is yes, then you ask the third and final question, is the doubt I have something that is – comes from the evidence? Is it something that has been provided from the stand or from the evidence by the defense or

[3] In his reply brief, appellant withdraws his argument that the court should have more specifically defined what constitutes a vehicle identification number for purposes of count 3.

by the People? [¶] You are not to speculate, you are not to guess and that is part of the instructions that the Court gave you. Don't make up your own defenses essentially is what it's saying. [¶] Use your common sense. That's what you are here for. You are members of our community. That's why you were chosen. Use your common sense. Do not leave your common sense at the door.

"[Defense Counsel]: Your honor, I'm going to object. There is no third element that [the prosecutor] argues in the reasonable doubt instruction.

"The Court: It's not an instruction.

"[Defense Counsel]: I think he is misstating the law.

"The Court: It's not an instruction, but it is fair argument. The objection is overruled."

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by the prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. . . . [W]hen the claim focuses on comments made by the prosecutor before the jury, the question is whether there is any reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

A prosecutor may not suggest that a defendant has the burden of producing evidence or proving his innocence. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1340; *People v. Young* (2005) 34 Cal.4th 1149, 1195-1196.) In keeping with this rule, the prosecutor in this case should not have urged jurors who harbored a reasonable doubt as to guilt to ask themselves whether that doubt was supported by evidence. Viewed in isolation, this comment tended to suggest that appellant had the burden of producing evidence to show a reasonable doubt as to his guilt. (See *People v. Hill* (1998) 17 Cal.4th 800, 831-832 (*Hill*) [though the issue was close, prosecutor's statement during closing

argument that there must be "some evidence from which there is a reason for a doubt" was misconduct].)

In context, however, the prosecutor was making the larger and legally permissible point that the jury should base its verdict on the evidence rather than on speculation. The jurors were instructed with CALCRIM No. 220, which properly defined the burden of proof beyond a reasonable doubt, and with CALCRIM No. 222, which advised them that they must base their decision only on the evidence presented and that the argument of counsel was not evidence. "Although the same standard is applicable for instructions by the court and comments by the prosecutor, it must be used with recognition of the differing nature and force of its two objects in the eyes of the jury. We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) Given the overall context of his remarks and the instructions given, the prosecutor's comments were harmless beyond a reasonable doubt. (See *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266, 1268-1269 [prosecutor's argument denigrating reasonable doubt standard by using power point presentation to compare it to jigsaw puzzle whose picture was recognizable with several pieces missing was harmless beyond a reasonable doubt where it was followed by court reading correct definition of reasonable doubt to the jury]; *People v. Simpson* (1954) 43 Cal.2d 553, 565-566 [instruction defining reasonable doubt as "doubt which has some good reason for its existence arising out of the evidence" was potentially confusing, but reversal not required]; contrast *Hill, supra*, 17 Cal.4th at pp. 844-848 ["constant and outrageous" misconduct by prosecutor in "a pervasive campaign to mislead the jury on key legal points" might well have required reversal in and of itself had numerous errors committed by trial court not been prejudicial].)

We reject appellant's suggestion that the court endorsed the prosecutor's argument, thus elevating it to the status of a jury instruction, when it overruled the defense objection. In explaining its ruling, the court specifically stated to counsel that the prosecutor's comments were *not* an instruction, but were "fair argument." Characterizing

the argument as "fair" did not adopt its content as a statement of the law for instructional purposes when the court specifically stated that it was *not* an instruction. The jury was advised by CALCRIM No. 200 that it must follow the court's instructions rather than counsel's comments if it believed the two to be in conflict.

D. *Oregon State Police's Officer's Testimony About Investigation*

Appellant contends the court erroneously admitted hearsay evidence of witness statements made to Oregon State Police Officer Lieutenant Nork during his investigation of the area in southern Oregon where appellant claimed to have purchased motorcycle parts from a "Jon Davis." We conclude that any error was harmless.

Nork had attempted to locate Davis by speaking with various people who lived in the area where appellant claimed to have made the purchase. Over a hearsay objection by defense counsel, Nork was allowed to testify that the various witnesses he interviewed were unable to provide him with information useful to his investigation. He was also allowed to testify that he was never able to locate a Jon Davis who was connected with the sale of any Harley-Davidson motorcycle in the area, and that none of the three individuals listed as Jon or J. Davis in the area's telephone book was able to provide useful information. Appellant argues that Nork's testimony was largely hearsay because it conveyed that what the various interviewees had told Nork.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) " 'Statement' means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.) Lieutenant Nork did not testify about any particular statement made by the people he interviewed, but the import of his testimony was that they told him they did not have any information about a Jon Davis or motorcycles sales in the area. These implied statements of the interviewees—which were relevant only if offered for their truth—suggested that no Jon Davis lived in the area and that appellant was lying when he claimed to have purchased the motorcycle engine in Oregon.

This case is unlike *People v. Zamudio* (2008) 43 Cal.4th 327, cited by the People, in which a witness was allowed to testify that her mother, the murder victim, had never said anything about her wallet being stolen prior to her killing by intruders who entered her home. (*Id*. at p. 350.) The Supreme Court concluded that the victim's failure to say anything about the wallet was nonverbal conduct rather than a hearsay statement or assertion, and that it was properly admitted to show that the wallet had been taken during a robbery when the victim was killed. (*Ibid.*) In the case before us, it was apparent from the lieutenant's testimony that the people he interviewed made verbal statements; the question is whether the jury would have necessarily gleaned the content of those statements from the testimony given. (See *People v. McNamara* (1892) 94 Cal. 509, 514-515 [officer's testimony that he arrested defendant based on information from non-testifying witness was inadmissible hearsay]; *Favre v. Henderson* (5th Cir.1972) 464 F.2d 359, 362 [implied hearsay where officer was improperly allowed to testify that he arrested defendant based on information from unidentified confidential informants].) We assume without deciding that Nork's testimony regarding the interviewees' lack of useful information was hearsay not subject to any exception.

The erroneous introduction of hearsay at trial requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 292, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) There is no reasonable probability here. Even without the testimony as to what Lieutenant Nork was told by various witnesses, the jury would have learned that he was unable to locate a Jon Davis in the area where appellant claimed to have purchased the motorcycle engine. More importantly, other evidence established that both the engine and the frame of the motorcycle that appellant purportedly assembled from salvage came from a single motorcycle that was stolen from Guy Carlson in Santa Rosa. Appellant claimed to have purchased the engine from Jon Davis in Oregon and the frame from Sonoma Custom Choppers in Petaluma. It is highly improbable the jury would have believed that he unwittingly purchased two major parts of the same stolen motorcycle from two separate sources located in different states.

Given the strong inference that appellant obtained the frame and the engine from a single source, the jury was highly unlikely to credit his story about the Oregon purchase, even if there had been no testimony suggesting Jon Davis could not be found.

We reject appellant's claim that the introduction of the hearsay evidence must be assessed under the more stringent "harmless beyond a reasonable doubt" standard for federal constitutional error because it violated his Confrontation Clause rights under *Crawford v. Washington* (2004) 541 U.S. 36, 68 (*Crawford*).) A *Crawford* violation occurs only when the out-of-court statement was "testimonial" in nature. (*Davis v. Washington* (2006) 547 U.S. 813, 821.) This requires a showing that the statement was made "under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*People v. Cage* (2007) 40 Cal.4th 965, 984.) Assuming Lieutenant Nork's testimony amounted to evidence of the out-of-court statements by his interviewees, the record does not establish that those statements were made with the degree of formality necessary to implicate *Crawford*. An "informal statement made in an unstructured setting" generally will not be deemed testimonial. (*People v. Morgan* (2005) 125 Cal.App.4th 935, 947.)

E. *Cumulative Error*

Appellant argues that the cumulative effect of the errors asserted on appeal require reversal even if the individual errors were not prejudicial in and of themselves. We have concluded that the conviction under Penal Code section 496d must be reversed due to instructional error. The other errors that occurred were harmless with respect to the remaining Vehicle Code counts whether they are considered individually or collectively. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1123-1124.)

DISPOSITION

Appellant's conviction of receiving a stolen motor vehicle under Penal Code section 496d, subdivision (a) (count 1) is reversed. His convictions of altering a vehicle identification number under Vehicle Code section 10802 (count 2) and defacing a motor vehicle identity number under Vehicle Code section 10750, subdivision (a) (count 3) are affirmed, as is the order placing appellant on felony probation.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.